

# SUBJECT INDEX.

	Page
Petition for Rehearing .....	1
Opinion below .....	1
Jurisdiction .....	2
Statutes involved .....	2
Questions presented .....	4
Statement .....	5
Summary of statement .....	5
Contract .....	7
Performance of contract work .....	8
Suit under contract, K-366 .....	8
Legislation, Special Act .....	9
Suit under Special Act, No. 45704 .....	10
Certiorari by Supreme Court, No. 26 Oct. 7, 1944 .....	10
Suit on remand Ct. Cls. decided Oct. 1, 1945 .....	11
Certiorari denied by Supreme Court Jan. 2, 1946 .....	12
Cases pending .....	12
Transcript of Record .....	14
Certificate of good faith .....	15
Specifications of errors to be urged .....	15
Reasons relied on for granting rehearing .....	15
Brief on petition for rehearing .....	17
As to errors assigned the court being under mandate: .....	17
1. Absentee judge voting to form majority .....	17
2. Absentee judge voting on point of law not before the court because of mandate .....	18
3. As to failure to remand for reargument before full bench .....	18
4. As to failure to certify question of law to Supreme Court under Sec. 3(a), Act of February 13, 1925 .....	19
As to Reasons for Granting Rehearing .....	19
(1) Decision contrary to U. S. Code.....	19
(2) Decision contrary to Special Act.....	19
(3) Decision contrary due process Constitution..	20
(4) Decision novel procedure Court of Claims....	20
(5) Novel procedure in other Federal Courts....	21
(6) Supreme Court sets cases for reargument full bench .....	21
(7) Absentee judge overturns decision Supreme Court .....	21

	Page
(8) Principle is involved in pending cases.....	21
(9) Why may not 2 absentee judges sit in judgment.....	21
(10) Decision contrary to prior procedure Ct. Cls...	21
Conclusion .....	22
Appendix .....	23
Journal Court Claims, March 8, 1945.....	23
Journal United States Supreme Court, Jan. 2, 1946..	24

### TABLE OF CASES CITED.

Pope v. United States, 76 Ct. Cls. 64 .....	8
81 Ct. Cls. 658 .....	9
86 Ct. Cls. 18 .....	9
100 Ct. Cls. 375 .....	11
303 U. S. 654 .....	9
323 U. S. 1 .....	10, 11
No. 45455 Ct. Cls. decided 10/1/45 Driscoll .....	13, 14
45596 Ct. Cls. decided 10/1/45 Stein .....	13, 14
45899 Ct. Cls. decided 10/1/45 Penn. Co.....	13, 14
<i>Eastern Cherokees v. U. S.</i> , 45 Ct. Cls. 104 .....	18
<i>Himely v. Rose</i> , 5 Cerandi 313 .....	18
<i>Martin v. Hunters Lessee</i> , 1 Wheat 304 .....	18
<i>In Re Potts</i> , Petitioner, 166 U. S. 263 .....	18
<i>Shaw v. People N. Y.</i> , 3 Hun. 272 .....	18
<i>Sibbald v. U. S.</i> , 12 Peters 488 .....	18
<i>Southern Garment Works Ass'n v. Fleming</i> , 122 F. 2d 622; 74 App. D. C. 228 .....	21
<i>Standard Oil Co. (Indiana) v. U. S.</i> , 78 Ct. Cls. 714...	18

### STATUTES CITED.

Act of February 13, 1925, Sec. 3(a) .....	2, 5, 15
Act of February 13, 1925 as amended, Sec. 3(b) .....	2
Act of June 23, 1874, 18 Stat. Chap. 468.....	17
Special Act of February 27, 1942, 56 Stat. 1122. .	2, 4, 9, 15
U. S. Code, Title 28, Chap. 7, §§241-293 .....	2, 4, 15, 17

### OTHER CITATIONS.

"Constitution of the United States—Revised and Annotated 1938" .....	15
Dwarris, 2nd ed., 1848 .....	18
Stroud's Judicial Dictionary .....	18

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1945.

---

No. 520.

---

ALLEN POPE, *Pro se*,

*Petitioner,*

v.

THE UNITED STATES,

*Respondent.*

---

**PETITION FOR REHEARING**

of

**Petition for Writ of Certiorari to the Court of Claims  
Denied January 2, 1946.**

---

Petitioner prays that rehearing be granted of his petition for issuance of writ of certiorari to review the judgment of the Court of Claims in the above entitled case; that, thereupon, the order of January 2, 1946, denying said petition be vacated; and that said petition be granted as therein and herein requested.

**OPINION BELOW.**

The opinion of the Court of Claims (R. 63-110) is not yet officially reported in the Court of Claims Reports. It is reported in 62 Fed. Supp. 408.

## JURISDICTION.

The judgment of the Court of Claims was entered October 1, 1945 (R. 146). Certiorari was denied January 2, 1946. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, and under Section 4 of the Special Act of February 27, 1942 (R. 1), and quoted below.

## STATUTES INVOLVED.

The statutes involved consist of a Special Jurisdictional Act of Congress supplying cause of action to petitioner and jurisdiction thereunder to the Court of Claims and to this Court, Private Law 306, 77th Congress, Approved February 27, 1942, 56 Stat. 1122; and the statutes relative to the General Jurisdiction of the Court of Claims as set out in "The United States Code, 1940 Edition," Title 28, Chapter 7, §§ 241-293 thereof, especially

- § 241. Judges.
- § 243. Session; quorum.
- § 250. Jurisdiction.
- § 263. Rules of practice.
- § 288. Certification to Supreme Court of questions of law; certiorari by Supreme Court to Court of Claims; no other review allowed.

The said Special Act (R. 1) reads as follows:

### "AN ACT

To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction be, and the same is hereby, conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any

statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States, as described and in the manner set out in section 2 hereof, which claims arise out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.

SEC. 2. The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper "B" and "pay" line three inches, and as to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing.

SEC. 3. Any suit brought under the provisions of this Act shall be instituted within one year from the date of the approval hereof, and the court shall consider as evidence in such suit any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, numbered K-366, in the Court of Claims, together with any additional evidence which may be taken.

SEC. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases.

Approved, February 27, 1942.

Of the "United States Code, 1940 Edition," the two following sections are quoted from pages 2513, 2514:

§ 241. (Judicial Code, section 136.) The Court of Claims shall consist of a Chief Justice and four judges, \* \* \*

§ 243. (Judicial Code, section 138.) The Court of Claims shall hold one session in the city of Washington, beginning on the first Monday in December and continuing as long as may be necessary for the prompt disposition of the business of the court. Any three of the judges of said court shall constitute a quorum, and may hold a court for the transaction of business: *Provided*, That the concurrence of three judges shall be necessary to the decision of any case.

### QUESTIONS PRESENTED.

(1) Whether the Court of Claims (as constituted and vested under United States Code, 1940 Edition, Title 28, Chapter 7, §§ 241 to 293, especially § 241, Judges; § 243, Session: quorum; § 250, Jurisdiction; § 263, Rules of Practice; and § 288, Certification to Supreme Court of questions of law; certiorari by Supreme Court to Court of Claims; no other review allowed; and under the current rules of said Court of Claims, especially Nos. 75 to 90 pertaining to hearing, argument and trial; and under the terms of the Special Act here involved, 56 Stat. 1122, supplying cause of action to petitioner and jurisdiction to the Court of Claims and to this Court) heard the case validly for decision where a quorum of four judges heard the oral argument and the decision (on the particular claim here involved) was given by concurrence of three judges, one of whom was not present at the trial, and where two judges, who were present thereat, dissented.

(2) The same, under the added circumstance that the sole issue disputed was a point of law, i.e., the interpretation of the Special Act as to whether it provides for payment of caved-in material as a separate item at the prior contract rate for excavation.

(3) The same, under the further circumstance that the case was one remanded by the Supreme Court, the meaning and constitutional validity of the said Special Act having been considered and decided and the decision of the lower court reversed with mandate ordering judgment accordingly.

(4) Whether under such foregoing circumstances the lower court should not have remanded the case for reargument before the full bench, or, if one of the regular judges was not available, one of the retired judges to serve instead and both parties invited to participate.

(5) Whether, under such above circumstances as obtained in the decision upon mandate below, the Court of Claims should not have certified to the Supreme Court the distinct question of law involved as to the meaning of the Special Act with respect to excavation of caved-in materials as provided by Sec. 3(a) of the Act of February 13, 1925, Rule 40 of this Court.

### **STATEMENT.**

**Summary of following statement:** The present request is on the basis of novel, Federal issue involving both the Constitution and laws of Congress, and upon new developments since denial of the petition for certiorari, all being matter believed of wide, general application.

The lower court, in an action based on a Special Act of Congress, held the Act unconstitutional; and singled out, as illustrating its contention, the clear provisions in the Act providing for payment of excavation of caved-in materials. This Court reversed the decision below and remanded the cause for judgment accordingly. Prior to the Special Act, petitioner had constructed a tunnel for the Government on a unit price contract which limited payment for excavation to a given line, but on the other hand, made representations as to geological formations, as to use of timber, and use of excavated materials. The roof of the tunnel caved in

throughout its whole length and the caved-in materials were excavated. In a suit (K-366) founded on the contract, petitioner could not claim this excavation of caved-in materials on the basis of excavation within the agreed pay line, but he did claim for the work on the basis of damage for an alleged misrepresentation. Recovery was denied upon this item among a number of others likewise desired. As to four of these items including this item of excavation, the Court made certain favorable comment. After five motions for new trial, the court suggested a jurisdictional Act in Congress.

Petitioner applied for an act covering all his claims. He subsequently, in an eighth bill, requested legislation covering only the four items as to which the court had made the favorable comment. The Attorney General reviewed the history of the claims, paraphrased the Act, enumerated the four items, and suggested that policy as to its passage was for the Congress to decide. The Claims Committees, of their own volition, examined exhibits and other evidence from the Court of Claims, considered petitioner's statement and enacted the bill creating new liability of the Government and supplying jurisdiction to the Court of Claims and to this Court. This Act the lower court held unconstitutional.

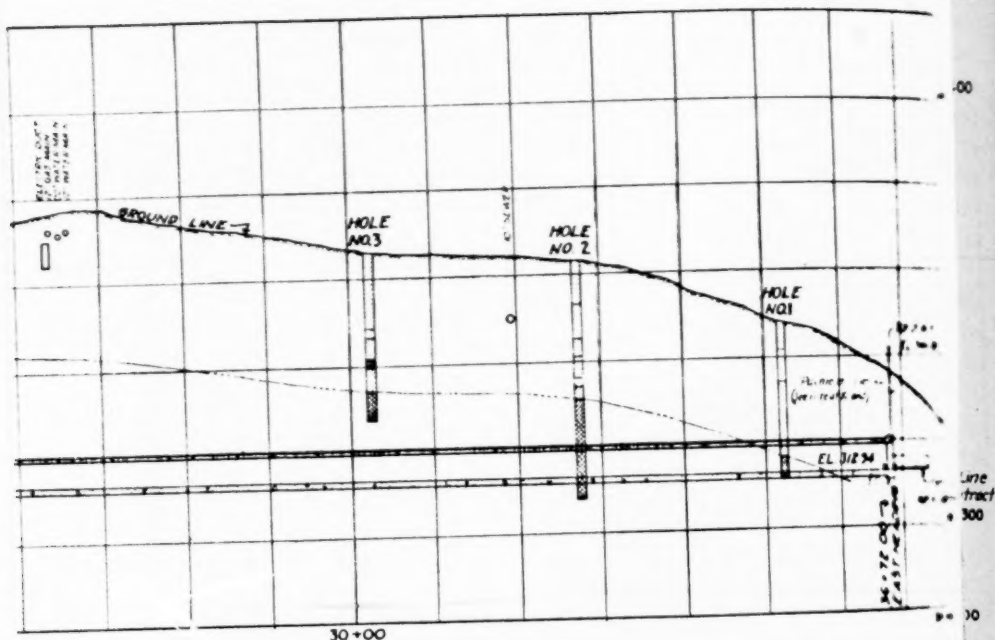
In action upon remand, a quorum of four judges heard the argument. The decision below was by the concurrence of three judges, one of whom was not present at the trial; two judges who were present dissented. This decision this Court declined to review on January 2, 1946. On the same day this Court deferred several cases for reargument before a full bench. Along with petitioner's case the lower court, on October 1, 1945, decided three other cases in the same manner by having the absentee judge sit in decision, two judges dissenting. On January 7, 1946, motions for new trial were overruled. Plaintiffs in two of these cases are proceeding further on the basis of the absentee judge principle. This is the novel, Federal issue and the recent de-











### BORING LEGEND

- Sand
- Clay
- Sand & Clay
- Gravel
- Rotten Rock
- Soft Rock
- Hard Rock

REVISIONS	
No.	Date
1	2-17-23

NO FORMS  
CIFICATIONS  
HIGH TUNNEL

Location of Borings shown thus in plan

## INCREASE OF WATER SUPPLY FOR DISTRICT OF COLUMBIA SECOND HIGH TUNNEL GENERAL PLAN AND PROFILE

IN 2 SHEETS - SHEET NO. 1  
Scales as Shown

U S Engineer Office, Washington, DC

Submitted:

*E. D. Hardy*  
Assistant Engineer

Approved:

*[Signature]*

Drawn: BSE  
Checked: POM  
Traced: BSE

APPROVED BY CHIEF OF ENGINEERS  
SEPT 22, 1924 E.D. 3740-1

velopment. It is not found that this practice was ever before indulged below. It is of particular importance in petitioner's case because, in effect it is believed, one lower court judge, who was absent from the trial, has virtually overturned the unanimous decision of this Court.

The above statements amplified, placed in proper sequence and as fully documented to the record are now given:

**Contract:** Petitioner constructed a tunnel under contract with the United States (R. 9-46). It was a unit price contract, covering ten items of work with definite limitations as to each item. Item No. 1 was for excavation (R. 38). Payments thereunder were restricted to such materials as were removed from within a given line called the "B" line (R. 38) and so designated on the contract drawing No. 2 (R. 146; reproduced R. 112 A; see also R. 112 B and R. 112 C). The contract made representations as to the character of geological formations revealed by government test borings (R. 25, par. 22). Contract drawing No. 1 (R. 146), reproduced opposite in pertinent part, depicted the tunnel as lying entirely in a region of rock, more than 90% of it designated as "hard rock." The contract further made representations as to the use of timber and as to the use of excavated material for crushed stone in making concrete and for stone in dry packing (R. 38, 39). The contract rate for excavation was \$17.00 per cubic yard; for concrete \$17.00 per cubic yard; for dry packing \$3.00 per cubic yard of space filled; for cement grout (liquid mortar consisting of cement, sand and water in specified proportions) \$3.00 per bag of cement so mixed and pumped into the dry packing (R. 9, 10, 65 par. 6). So mixed, one bag of cement resulted in 2.62 cubic feet of grout (R. 128). The spaces or voids between the stones of the dry packing, were 40% of the space packed or 10.8 cubic feet per cubic yard of space packed and required the use of 4.1 bags of cement to make the grout necessary to fill said voids (R. 128). At the contract rates:

The cost of one cubic yard of concrete masonry was	\$17.00
The cost of one cubic yard of dry packed and	
grouted masonry was, for dry packing,	\$3.00
For grout 4.1 bags at \$3.00	12.30

---

Total for dry packed—grouted masonry \$15.30    \$15.30

**Performance of contract work:** Petitioner constructed the tunnel in accordance with the contract, as directed by and under the supervision of the contracting officer (R. 110-122; 63-67). The roof of the tunnel proved not to be "hard rock" as expected but loose, unstable material which caved in throughout the full length of the tunnel (R. 112 B, 112 C, 121) and, in places, caved to the ground surface above (R. 121). The officer required all of this caved-in material to be excavated from the tunnel. Such caved-in material from outside the "B," or pay, line could not be paid for as excavation under Item No. 1. The officer declined to pay for it otherwise. Petitioner thereupon claimed misrepresentation of the formation disclosed by the test borings and asked to be paid for the additional costs involved (R. 120, 121). Defendant paid for the timber which it required to be used (R. 116, 117, Fdg. V) but refused payment for excavating the caved-in material claimed as a quantum meruit for alleged misrepresentation (R. 120, 121). This work of excavating the caved-in materials was done; the Government had the benefit but has not paid for it (R. 67).

**Suit under the contract:** Petitioner sued under the contract as cause of action, No. K-366 in the Court of Claims (R. 110-145), 76 Ct. Cls. 64. The court's finding XIV as to the damage resultant from the alleged misrepresentation is set out R. 120-122 and further illustrated by its Plates II and III (R. 112 B and R. 112 C), and discussed in the opinion (R. 145), Finding XIV concludes:

The contractor did encounter much material which was soft, seamy rock and running earth, materials contrary in foundation from what he expected to encounter, but drawing No. 1 or the information supplied him by the

contracting officer did not misrepresent what the borings actually disclosed. The cost of excavation was materially increased to the contractor in an amount not established by the evidence.

Thereafter petitioner filed five motions for new trial and applied for certiorari, 81 Ct. Cls. 658; 86 Ct. Cls. 18; 303 U. S. 654. In all of these efforts petitioner contested for this item of damage consequent to the alleged misrepresentation, which was solely the cost of removing the caved-in material.

The court disallowed completely many of the items claimed, but as to four of them it made certain favorable comments, including that just quoted as to excavation. As to the drypacking and grouting it said (R. 129):

We have said that the plaintiff might recover for the total area dry packed and grouted. The obstacle in the way is the lack of proof defining the extent of space drypacked.

As to the excavation and concrete work required to be done by the officer's changes in plan, Finding XI (R. 118) ascertained the costs exactly, and, in opinion, the court said (R. 140):

The contracting officer possessed no authority to do what he did, and the contractor would have been within his contractual rights in refusing to proceed until the contract provisions were complied with.

**Legislation:** The judgment in K-366 having become final, petitioner applied to Congress for relief. The record here sent up (R. 1-146) reveals little of what was done in Congress except the final result, the Special Act of February 27, 1942 (R. 1). Public documents, of which, it is believed, the court may take judicial notice are printed in the Appendix to Petition for Certiorari No. 520, October Term, 1945, pp. 15-40 thereof. These documents consist of eight bills and Report No. 1019 of Claims Committee of the Senate. The first bills in the sequence purport to supply juris-

diction to cover all the claims denied in K-366. The fourth bill, p. 17 of that Appendix, discards the contract as cause of action and purports to create new liability for but three items of work, not including the excavation of caved-in materials. The fifth bill incorporates payment at

“contract rates” \* \* \* “for the work of excavating materials which caved in over the tunnel arch \* \* \*”

Said App. pp. 18-20. The bill establishes three criteria for award thereunder, namely;

(1) that the work shall have been performed; (2) that payment shall not have been made; (3) that the Government shall have received the use and benefit.

This bill is substantially the form of the bill ultimately passed. It permits adjudication of but four items of claim, namely those as to which the court had made favorable comment as just noted hereinabove.

**Suit under the Special Act:** Suit under the Special Act as cause of action was filed, No. 45,704 in the Court of Claims (R. 1), 100 Ct. Cls. 375. Testimony was taken, and Commissioner's Report filed (R. 63). The case was argued and submitted on the merits (R. 47).

The court, without making any findings, held the Special Act unconstitutional, as an infringement upon the judicial powers of the court and dismissed the petition (R. 60), Littleton, *Judge*, dissenting (R. 59).

Jones, *Judge*, took no part in the decision of this case (R. 60).

There were four items of claim (R. 3-8). The court discussed “just one of the items”, the primary item of excavation of caved-in materials (R. 55-57).

**Certiorari by Supreme Court:** The Supreme Court granted petition for writ of certiorari to the Court of Claims. The case was argued October 16, 1944, and decided November 6, 1944, 323 U. S. 1. The matter of excavation of caved-in materials was covered by the briefs. During oral argu-



ment, Mr. Assistant Attorney General Shea, for respondent, held that Congress did not intend to include as a separate item this item of excavation of caved-in materials. Mr. Justice Frankfurter asked Mr. Shea the source of his information. Mr. Shea replied, "The Claims Committee Report." Mr. Justice Frankfurter said, if petitioner recalls correctly, "I have read every word of it!" The committee report was not part of the record sent up. He had it before him and proceeded to read from the report the statement of Mr. Attorney General Robert H. Jackson, paraphrasing the Act and stating what the Act directed as follows:

Section 2 of the bill would direct the Court of Claims to determine and render judgment on certain claims of Pope for "work performed for which he has not been paid, but of which the Government has received the use and benefit." This work is described as certain excavation and concrete work performed pursuant to change orders and the excavation of caved-in places and the filling of such caved-in places with dry-packing and grout.

Mr. Shea was silent.

This court held that the Act's purpose and effect were "to create a new obligation of the Government to pay petitioner's claims where no obligation existed before," 323 U. S. 1, 9. Also "Congress has in effect consented to judgment in an amount to be ascertained by reference to the specified data," *Id.*, 11. The court remanded the case December 5, 1944, with instructions to the Court of Claims to render judgment in accordance with its decision of November 6, 1944.

**Suit on remand:** On March 8, 1945, the case was again argued and submitted on merits (R. 63).

This suit was not submitted on the briefs.

Judge Marvin Jones was not present at the argument.

This fact is not given in the record though Judge Jones is registered as concurring with Judge Madden and Chief

Justice Whaley to form the majority opinion (R. 83), Judges Littleton and Whitaker dissenting in part i.e., as to the item of excavating caved-in materials (R. 84, 110). Upon application, the Chief Clerk of the Court of Claims, with consent of the Chief Justice, has supplied a certified copy of the Journal of the Court of Claims for March 8, 1945, which is submitted herewith and printed in the appendix hereto. Said journal shows that Judge Jones was not present at the argument and submission of the case.

The lower court unanimously allowed three of the four items claimed. The majority, consisting of Judge Madden, Judge Jones and Chief Justice Whaley, disallowed the item for excavating the caved-in materials, which work it had found was done, that the government had received the use and benefit thereof and had not paid therefor (R. 67, 71-83). It had found further (R. 65) that the contract rate for excavation was \$17 per cubic yard, but held (R. 67) that;

the plaintiff will have been paid for that work what he expected to receive under the contract and what he was entitled to receive at contract rates, when he is paid the contract rates for dry packing and grouting the spaces left by the cave-ins.

Judge Littleton dissented as to the disallowance of this item (R. 84-110). Judge Whitaker concurred in the dissent (R. 110).

**Petition for writ of certiorari** to the Court of Claims to review the judgment of October 1, 1945, was duly filed, No. 520, October Term, 1945. Respondent contended, "The current question presented by petitioner is one neither of importance nor of any general significance. It is unique, involving no general principles, and its resolution will resolve no controversies presently pending or likely to arise in the future. In these circumstances, we submit that a writ of certiorari should not be granted." The petition was denied January 2, 1946.

**Cases pending:** On October 1, 1945, the Court of Claims announced decisions in sixteen cases. The Journal of the

Court of Claims records the absence of Judge Jones during the oral argument (called the "trial" in the court's rules) of each of these cases. In twelve of the cases, the printed decisions state that Judge Jones took no part in the decision thereof. These were cases Nos. 43,565; 44,614; 44,659; 45,623; 45,760; 45,778; 45,821; 45,993; 46,235; 46,365; 46,369 and 46,378.

In four of the cases decided October 1, 1945, there were two judges in each instance who had heard the oral argument but who ultimately dissented. In each of these cases Judge Jones is recorded as joining with Chief Justice Whaley in concurring with the writer of the opinion "the concurrence of three judges shall be necessary to a decision of any case," (U. S. Code, Title 28 § 243.) These cases were as follows:

No. 45,455. *Geo. F. Driscoll Company v. The United States*, argued and submitted October 4, 1944; decided and petition dismissed October 1, 1945; motion for new trial overruled January 7, 1946;

No. 45,596. *Minette G. Stein v. The United States*. Argued and submitted November 8, 1944; decided and petition dismissed October 1, 1945;

No. 45,704. Petitioner's case, *Allen Pope v. The United States*. Argued and submitted March 8, 1945; decided, with 3 items of claim allowed, 1 item disallowed, October 1, 1945; petition for writ of certiorari denied January 2, 1946;

No. 45,889. *Pennsylvania Company et al v. The United States*. Argued and submitted March 7, 1945; decided and petition dismissed October 1, 1945; motion for new trial overruled January 7, 1946.

None of these cases was submitted on the briefs.

The foregoing information was obtained by petitioner from the Docket and the Journal of the Court of Claims by permission of the Clerk who had consulted the Chief Justice. Upon request for certified copy of the Journal revealing the absence of Judge Jones from the trial in the several

instances, the Clerk stated that he had exceeded his authority except as to the record in petitioner's own case in permitting examination of the Journal and was not permitted to supply certified copies relating to other cases. Petitioner further requested, through the Secretary, interview with the Chief Justice at his convenience. He asked that the Chief Justice be informed of his intention to file petition for rehearing of his petition for certiorari, and of his desire to be furnished citations or precedents to sustain the action of the court in having Judge Jones sit in decision of the case, Judge Jones having been absent during the trial and having cast the vote necessary to the decision. Petitioner also asked for a list of cases argued before June during Judge Jones' absence and remaining undecided after January 7, 1946. The Secretary said that he had given petitioner's message to the Chief Justice, who said that because of press of business he was not granting any interviews. No answer was given to the inquiries.

It is believed matter of general knowledge that Judge Marvin Jones was absent from the court for a considerable period on war assignment and was War Food Administrator from June 29, 1943 until June 30, 1945.

Similarly, it is believed known, that Judge Madden is now abroad for an indefinite period on assignment pertaining to war settlements.

Counsel in two of the above cases, Mr. Arthur J. Phelan in No. 45,455, and Mr. Frank J. Albus in No. 45,889, inform petitioner that they are taking further immediate action in their respective cases involving the participation of Judge Jones in the decisions thereof.

### **TRANSCRIPT OF RECORD.**

The certified transcript of the record of the proceedings below, as filed herein and printed, consists of pages 1 to 146 inclusive, and of 2 contract drawings not printed but filed separately (R. 146).

## **CERTIFICATE OF GOOD FAITH.**

This petition for rehearing is presented in good faith and not for delay.

### **SPECIFICATION OF ERRORS TO BE URGED.**

The Court of Claims, under the mandate of December 5, 1944, and in addition to the errors specified to be urged in the petition for certiorari, erred:

(1) Where a quorum of four judges was present at the trial of the case and a fifth judge (Judge Marvin Jones), who was not present, sat in decision providing concurrence of three judges necessary to the decision of the major item in suit and two judges who were present dissented.

(2) Where, under the same circumstances, the disputed issue was a point of law, i.e., the interpretation of a Special Act of Congress, as to whether said Act provides for payment of excavation of caved-in materials as a separate item at the prior contract rate for excavation.

(3) In failing to remand the case for reargument before a full bench.

(4) In failing to certify the distinct question of law necessary to the decision of the case to the Supreme Court under Sec. 3(a) of the Act of February 13, 1925.

### **REASONS FOR GRANTING REHEARING.**

(1) The decision of the Court of Claims, in the major item in suit, arrived at only with the concurrence of a judge, who was absent from the trial, is contrary to the United States Code establishing and vesting said Court of Claims.

(2) The said decision thus made is contrary to the Special Act, 56 Stat. 1122, providing jurisdiction and requiring determination and judgment.

(3) The said decision as made is contrary to the "due process" provisions of the 5th and 14th Amendments to the Constitution.

(4) The said decision as made is novel procedure in the Court of Claims; never, as far as petitioner is able to discover, having been practiced theretofore.

(5) The said sort of decision is novel in any Federal court, so far as petitioner is able to discover, or in State courts especially where prescriptions of law control.

(6) The Supreme Court, not under law of Congress nor under the customary rule in cases of tie votes on appeal cases, frequently, in the interest of justice, sets cases for reargument before a full bench.

(7) As the decision stands, the effect is that by device of reconstruing an Act of Congress, the lower court by means of the vote of one judge who did not participate in the trial overturns the decision of the Supreme Court.

(8) The same sort of decision was made below in three other cases on the same date, in which further action is now pending and turning on the validity of the concurrence of the absentee judge.

(9) If one absentee judge may sit in effective judgment why not two absentee judges, three judges constituting a quorum?

(10) The procedure in said decision is contrary to procedure in prior cases in said court where, though there was the required quorum of judges who heard the argument, one judge dissented and an absentee judge voted with the majority and was assigned to write the opinion, a reargument was ordered and had. *Standard Oil Company of Indiana v. The United States*, 78 Ct. Cls. 714.

The assigned errors and reasons for granting the rehearing will be discussed in a short brief principally for the purpose of citing authorities.

ALLEN POPE, *Pro se*,  
Petitioner.

